

## ORIGINAL TRANSCRIPT

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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In re:	)	Transcript of
	)	Proceedings
	)	
EASY STREET HOLDING,	)	
LLC,	)	
	)	
Debtor.	)	Bankruptcy Number
	)	09-29905
	)	Judge Mosier

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P R O C E E D I N G S

THE CLERK: Please be seated.

This is in the matter of Easy Street Holding, LLC.

THE COURT: Will counsel, please, note their appearances?

MR. CANNON: Your Honor, Kenneth Cannon of Durham, Jones and Pinegar, Corbin Gordon who is special counsel to the debtors and will be handling the hearing on behalf of Easy Street Partners, LLC, debtor in possession.

MR. PAYNE: Douglas Payne of Fabian and Clendenin on behalf of Gateway Center, LLC.

THE COURT: Counsel.

MR. GORDON: Thank you, Your Honor.

We recognize that we've got some scheduling things going on this afternoon, Your Honor. We will attempt to be as direct as possible as we present the evidence today.

The procedural background to this matter is as follows: Easy Street Partners was lessee under a lease for office space with Gateway Partners.

The partners had largely abandoned the space by December of 2009.

1 On or about January 12, 2010, the lease  
2 was deemed rejected. The lease was current at the  
3 time of its deemed rejection.

4 The landlord filed a claim for damages  
5 from a rejection of the lease.

6 Partners believes that it should owe  
7 nothing under the lease because of the landlord's  
8 breaches of the lease.

9 And this hearing is on Partners' objection  
10 to claim for rejection damages asserted by Gateway.

11 Your Honor, this is a case of profits over  
12 safety. The landlord, Gateway Center, was notified  
13 of numerous safety violations over a 12-month period  
14 and chose to ignore these violations in favor of  
15 making profits over fixing the problems and  
16 maintaining the safety of its tenants.

17 In contrast, Easy Street Partners, LLC,  
18 knowing of the safety violations that came as a  
19 result of an inspection performed by UOSH, the State  
20 of Utah Labor Commission workplace and health  
21 consultation, and then a subsequent independent  
22 investigation by Summit Engineering, could not let  
23 its employees work in a building where there were  
24 safety code violations, specifically where those  
25 safety code violations could result in serious injury

1 or death in a case of an emergency.

2 Working in a building with safety code  
3 violations was not part of the bargain with the  
4 landlord and the risk associated with such violations  
5 should not be shifted to the tenant, Easy Street.

6 You're going to hear from two witnesses  
7 today, Your Honor. Depending on time, shortly from,  
8 possibly, another one.

9 Mr. Shoaf, Easy Street -- manager of Easy  
10 Street Partners, will testify that the UOSH  
11 inspection raised the issue of his leased space  
12 exceeding safety code for egress which states that a  
13 person must reach an exit within 100 feet of any spot  
14 in the rented space.

15 Shoaf will testify that over the next four  
16 months he did everything in his power to address the  
17 egress issue, including meeting with the city  
18 building department, speaking with Phillip Hahn, an  
19 expert he was referred to by the landlord, who told  
20 him the space was noncompliant, several meetings with  
21 the landlord's engineer, Aarin Holt, and finally  
22 asking UOSH to take formal action, which it claimed  
23 it had no jurisdiction to do.

24 The result was that the city would not put  
25 in writing that his space was compliant, forcing Easy

1 Street to withdraw out of safety concerns.

2 Attempts to obtain a building permit on  
3 the leased space led to additional discoveries of  
4 safety violations that were later confirmed by Summit  
5 Engineering and a recent inspection by Park City  
6 building department.

7 Shoaf will testify that he did not go  
8 looking for these violations, that the discovery of  
9 violations arose while he was doing due diligence and  
10 resolving the egress issue raised by UOSH.

11 He will testify he withdrew his employees  
12 out of the space due to concern for their safety and  
13 that he will not assume the liability of using the  
14 space with the present violations.

15 Mike Johnston, from Summit Engineering,  
16 will testify that he conducted an inspection and  
17 created a report and his conclusions are that there  
18 were numerous safety code violations that could  
19 result in injury or death in an emergency situation  
20 in the Gateway Center where the leased space is.

21 If there is time, Your Honor, we will have  
22 Marina Soto, human resource director, testify that  
23 the UOSH inspection was supposed to be initially on  
24 the Gateway -- or on the Sky Lodge, which is across  
25 the street from the leased space. When the inspector

1 arrived, to everyone's surprise, he went across the  
2 street. He asked them, do you have any other space  
3 that you're occupying? And then did an inspection of  
4 the leased space, and that's where the initial  
5 problems came from and all of the things that we're  
6 talking about today flow from that.

7 And so her testimony would be that she  
8 will not -- that they did not go looking for the  
9 violations, Your Honor.

10 And based on that, we will proceed with  
11 putting forth our evidence.

12 THE COURT: All right. Mr. Payne.

13 MR. PAYNE: Your Honor, I think the  
14 evidence will show that there's been a history of  
15 this tenant, Easy Street Partners -- which is not the  
16 original tenant, by the way. Easy Street Partners  
17 assumed -- entered into an assumption and assignment  
18 agreement with the original tenant, Cloud Nine  
19 Resorts, LLC, in January 2009. And within a few  
20 months after doing so, started peppering the landlord  
21 with claims of alleged violations, the first being a  
22 claim that there was -- that an exit was too far away  
23 from some of the space, that it needed to be less  
24 than 100 feet. And there was more than that. And  
25 that was resolved by an architect and the city as



1 well. And it was measured and remeasured and found  
2 not to be a violation.

3 Notwithstanding that fact, that violation  
4 was reasserted and reasserted and reasserted and  
5 additional violations or claimed violations were also  
6 asserted. None of the violations that were asserted  
7 are significant violations. We believe that if there  
8 are any violations, they are technical, they are not  
9 material, they are not a threat to health and safety.

10 And we believe that the evidence will  
11 establish that, in fact, this UOSH violation, or OSHA  
12 violations, that was never provided -- that  
13 information was never provided in written form to the  
14 landlord.

15 The landlord attempted to get that  
16 directly from OSHA, or UOSH, and was told that there  
17 was no such written report. We made request on the  
18 tenant. That was never provided until last Friday,  
19 or late Thursday night, when there was an attachment  
20 of some report document to the reply memorandum.

21 And, interestingly enough, although the  
22 reply memorandum said had Easy Street Partners been  
23 aware of this problem that they were tipped off to by  
24 the OSHA violation, they would never have entered  
25 into the lease.

1 Well, the problem with that is that the  
2 date of the inspections by UOSH, or OSHA, was in the  
3 fall of 2008, which predates Easy Street becoming the  
4 substitute tenant in this space.

5 I think there's a clear pattern of just  
6 trying to identify some technical violation to  
7 attempt to escape their responsibility under the  
8 lease, Your Honor.

9 And we think the evidence will also  
10 indicate that they remained in the space until  
11 January of this year.

12 Thank you.

13 MR. GORDON: Your Honor, if I may.

14 THE COURT: You may.

15 MR. GORDON: We've got a couple of  
16 housekeeping matters before I call my first witness,  
17 Your Honor. I spoke with Mr. Payne and we have  
18 stipulated that the correspondence that went back and  
19 forth between counsel will be admitted into evidence.  
20 None of the attachments will be admitted. And we're  
21 not admitting it for purposes of truthfulness of  
22 those things asserted in it, but that the letters  
23 were sent back and forth, so they will come on the  
24 record as such.

25 Has that been accurate?

1 MR. PAYNE: That's correct.

2 MR. GORDON: Okay.

3 THE COURT: All right.

4 MR. GORDON: So if I may, Your Honor, I  
5 will approach with the four copies of correspondence.

6 May I approach, Your Honor?

7 THE COURT: If you'll hand those to the  
8 clerk.

9 Have they been marked as exhibits yet?

10 MR. GORDON: They have not, Your Honor.

11 THE COURT: All right.

12 MR. GORDON: Your Honor, as a secondary  
13 matter, I would move to admit the letter from Park  
14 City building department that we received last week  
15 into evidence. We have spoken with the department  
16 and we have obtained a certified copy of that letter  
17 that I can present to the Judge.

18 THE COURT: Was the letter attached as  
19 Exhibit A to your reply memorandum?

20 MR. GORDON: Yes, Your Honor, it was. And  
21 I have -- and this is -- if I may approach, Your  
22 Honor.

23 THE COURT: You may.

24 THE CLERK: Do you want these each marked  
25 as an exhibit?

1 Okay. And I'm marking these as numbers.

2 MR. PAYNE: What number exhibit is that?

3 THE COURT: I think that will be Exhibit  
4 Number 4?

5 MR. GORDON: Number 5. There will be four  
6 letters and then that will be Number 5.

7 So unless there was any objection, Your  
8 Honor, I would move to admit the letter from Park  
9 City into the record.

10 THE COURT: Any objection, Mr. Payne?

11 MR. PAYNE: The certified copy, no  
12 objection.

13 THE COURT: Did you move to admit the  
14 first four exhibits?

15 MR. GORDON: Oh, I'm sorry, Your Honor.  
16 Can I move -- I would move to admit the first four  
17 exhibits, which are correspondence that I've sent to  
18 opposing counsel.

19 THE COURT: Any objection, Mr. Payne?

20 MR. PAYNE: No objection.

21 THE COURT: All right. Exhibits 1 through  
22 5 are admitted.

23 MR. GORDON: Thank you, Your Honor.

24 I will call as my first witness today  
25 Mr. Mike Johnston.

1 If you will please take the stand.

2 THE CLERK: Please step forward and raise  
3 your right hand.

4

5 MICHAEL P. JOHNSTON,

6 called as a witness, having been duly  
7 sworn, was examined and testified as follows:

8

9 THE CLERK: Please take the witness stand.  
10 State and spell your name.

11 THE WITNESS: My name is Michael P  
12 Johnston. M-I-C-H-A-E-L, middle initial P, Johnston,  
13 J-O-H-N-S-T-O-N.

14 THE COURT: Excuse me just a minute.

15 I guess if it's connected, we can --

16 MR. GORDON: Okay. May I proceed, Your  
17 Honor?

18 THE COURT: You may.

19 MR. GORDON: Thank you.

20

21 DIRECT EXAMINATION

22 BY MR. GORDON:

23 Q. Mr. Johnston, who do you work for?

24 A. I'm employed by Summit Engineering Group  
25 in Heber City, Utah.

1 Q. Are you a principal in that company?

2 A. Yes.

3 Q. How long have you worked as an engineer?

4 A. I began working as an engineer in 1993.

5 Q. What licenses or certifications do you  
6 presently hold?

7 A. I'm licensed as a professional structural  
8 engineer in the State of Utah.

9 Q. What is your educational background?

10 A. I received a bachelor of science in civil  
11 engineering from Brigham Young University, a master's  
12 of civil engineering from the University of Michigan.

13 Q. In your work, are you familiar with the  
14 Uniform Building Code and the International Building  
15 Code?

16 A. Yes, I am.

17 Q. What type of engineering work do you do?

18 A. I'm primarily a structural engineer. I do  
19 design and review of building structures,  
20 residential, commercial, industrial.

21 Q. Have you been asked to perform an  
22 inspection of the Gateway Center located at 136 Heber  
23 Avenue, Park City, Utah?

24 A. Yes.

25 Q. What were you asked to do?

1           A.       I was asked to review the tenant's leased  
2 space on the third floor of the Gateway Center and  
3 also to review the public spaces pertaining to  
4 exiting and accessibility issues per the building  
5 code.

6           Q.       Did you perform this work?

7           A.       Yes, I did.

8           Q.       When did you do that?

9           A.       I did this in December of last year, 2009.

10          Q.       Did you analyze any building permits or  
11 building plans for the building in creating your  
12 report?

13          A.       No, I did not.

14          Q.       Why not?

15          A.       I attempted to obtain construction plans  
16 and permit plans from Park City building department.  
17 They could not produce them. I also attempted to  
18 obtain then tenant permit plans for unit 303, the  
19 leased space, and they did not have any on record.

20          Q.       Did you prepare a report?

21          A.       Yes.

22                   MR. GORDON: Your Honor, may I approach?

23                   THE COURT: You may.

24          Q.       (By Mr. Gordon) Mr. Johnston, I'm handing  
25 you what is marked as Exhibit Number 6. Do you

1 recognize it?

2 A. Yes.

3 Q. What is it?

4 A. A copy of my report I prepared of my  
5 findings.

6 Q. Did you personally prepare everything in  
7 the report?

8 A. Yes, I did.

9 Q. Did you take the pictures in the report?

10 A. Yes, I did.

11 Q. Are those pictures an accurate depiction  
12 and representation of the Gateway Center as it  
13 existed on the date you conducted your report?

14 A. Yes.

15 Q. How did you obtain the facts of data -- or  
16 data you used in preparing your report and drawing  
17 your conclusions?

18 A. I made two different site visits to the  
19 Gateway Center personally, visually inspected the  
20 lease space and the public areas.

21 Q. How did you apply the facts that you  
22 gathered to the Uniform Building Code?

23 A. I'm familiar with the code. I  
24 particularly addressed chapter 10, which is means of  
25 egress, and chapter 11, accessibility pertaining to



1 the lease space and the public space, but primarily  
2 the two required emergency exit stairwells.

3 Q. Are the methods that you used in obtaining  
4 the data and applying it to the code generally  
5 accepted in the field of engineering?

6 A. Yes.

7 Q. Based on your physical inspection of the  
8 Gateway Center and the analysis of the Uniform  
9 Building Code, is it your opinion that the building  
10 contains code violations?

11 A. Yes, it is my opinion.

12 Q. Are those code violations set forth in  
13 your report?

14 A. Yes, they are.

15 MR. GORDON: I would move, Your Honor, to  
16 admit the report into evidence.

17 MR. PAYNE: No objection.

18 THE COURT: Exhibit Number 6 is received.

19 MR. GORDON: Your Honor, may I approach?

20 THE COURT: You may.

21 Q. (By Mr. Gordon) Mr. Johnston, I've handed  
22 you what has been marked as Exhibit Number 7. Do you  
23 recognize it?

24 A. Yes.

25 Q. What is it?

1           A.       This is a copy of chapter 10 and chapter  
2       11 of the 1994 Uniform Building Code. This was  
3       included in the appendix of my report.

4           Q.       Is this the code you used to form your  
5       conclusions?

6           A.       Yes.

7           Q.       Is what I've handed you a correct and  
8       accurate copy of those sections of the code?

9           A.       I believe so, yes.

10          MR. GORDON: Your Honor, I move to admit  
11       Exhibit 7.

12          MR. PAYNE: Your Honor, I'll object, at  
13       least for the time being. I don't have a copy of  
14       that. And I wasn't provided with a copy of Exhibit  
15       6, which I assume has the appendix.

16          MR. GORDON: I can provide those. I'm  
17       sorry, Your Honor, I did not hand those to him. I  
18       can do so.

19          THE COURT: All right.

20          MR. PAYNE: No objection, Your Honor.

21          THE COURT: Exhibit 7 is received.

22          Q.       (By Mr. Gordon) Mr. Johnston, if you'll  
23       turn to your report. Could you, please, give me a  
24       brief overview of the space that you were asked to  
25       analyze?

1           A.       Sure. The Gateway Center consists of  
2 three floors of retail lease space above the street  
3 level. Below that is two levels of underground  
4 parking space.

5                   The leased space from Easy Street Partners  
6 is on the top, third floor, northwest corner.

7           Q.       If you could turn to page -- I guess it  
8 would be 3 of your report. We'll just walk briefly  
9 through it. On this page --

10                  MR. GORDON: And, Your Honor, would you  
11 like a copy of this to follow as we go?

12                  THE COURT: It probably would be a good  
13 idea.

14                  MR. GORDON: May I approach, Your Honor?

15                  THE COURT: You may.

16           Q.       (By Mr. Gordon) Mr. Johnston, can you,  
17 please, explain to us what your findings were in  
18 section number 1 of your report?

19           A.       Yes. I primarily concentrated on the  
20 emergency exiting for the third floor leased space,  
21 which consists of two stairwells, fire protected  
22 stairwells. One of them is on the east, one is on  
23 the west.

24                   Let's start with the east. I started with  
25 that, number one. I quickly noted that there's an

1 area of refuge within this -- top of the stairwell.  
2 The area of refuge was undersized and did not meet  
3 the minimum requirements of the building code.

4 Q. Can you explain, what is the purpose of an  
5 area of refuge?

6 A. An area of refuge is required to provide  
7 temporary refuge, a place to get out of the -- if  
8 there's a problem, to get out of the way into a fire  
9 protected enclosure so that they can wait for rescue  
10 personnel to assist them. They can communicate with  
11 rescue personnel. This would be for people that are  
12 disabled, such as in a wheelchair or with an elderly  
13 person with a walker, someone that is on crutches,  
14 someone that is slow, visually impaired, any of that  
15 kind of stuff.

16 Q. Okay. Based on how this area of refuge is  
17 built, can a wheelchair access it?

18 A. No.

19 Q. What types of danger does this type of  
20 violation create?

21 A. Well, the area of refuge -- in this  
22 particular case, I've noted in item 1 and 2 -- is  
23 inaccessible if you -- if you open this door, this  
24 access door into the safe stairwell -- there is a  
25 sign that says area of refuge, identifies it as such.

1 You open the door and perchance wheel yourself in in  
2 your wheelchair, you're going to be faced with the  
3 stairs in front of you. You cannot get around the  
4 door. And so -- well, you can't access it. It's  
5 undersized. You would have to back out and stay in  
6 the hallway or something.

7 Q. Okay. Did the Park City building  
8 inspector agree with you on your analysis in points 1  
9 and points 2?

10 A. Yes, he did.

11 Q. Let's turn on the next page. On number 3,  
12 can you walk us through the analysis there?

13 A. Again, there's an area of refuge at the  
14 bottom of this stairwell, down in the parking garage.  
15 It must be accessible with a level surface or with a  
16 ramp in order to allow someone to get into it that's  
17 disabled. There is a four-inch curb that is in the  
18 way -- that should be a ramp -- and so it's not  
19 accessible.

20 Q. Did the Park City inspector agree with you  
21 on this point?

22 A. Yes, he did.

23 Q. Can you walk us through number 4?

24 A. Number 4, I noticed bottom of east  
25 stairwell the area of refuge was filled with garbage

1 cans and furniture and other debris blocking the area  
2 of refuge. And so someone that would enter this  
3 space would just be sitting at the bottom of the  
4 stairs in the way of everybody else trying to use the  
5 stairs.

6 Q. Let me back up on the first three. When  
7 was the last time that you were in the building?

8 A. I was there -- I visited yesterday --

9 Q. On points --

10 A. -- afternoon.

11 Q. On points 1 and 2, have those issues been  
12 remedied?

13 A. They were not remedied yesterday.

14 Q. Point 3, has that been remedied?

15 A. That has not been remedied.

16 Q. Point 4, has that been remedied?

17 A. That was remedied, and the items were  
18 removed.

19 Q. Okay. Can you walk us through section 5  
20 of your report?

21 A. Section 5 deals with two-way emergency  
22 communication systems in all areas of refuge. And  
23 throughout this building there would be at least six  
24 areas of refuge that I can remember. None of them  
25 have the required posting of instructions that would

1 tell somebody how to use the equipment, what other --  
2 what assistance might be provided, how to communicate  
3 with rescue personnel.

4 Q. Did the Park City inspector agree with you  
5 on this point?

6 A. Yes, he did.

7 Q. Can you walk me through number 6?

8 A. Number 6, down in the east stairwell,  
9 again, trash cans under the stairs, furniture. It's  
10 a violation of -- there cannot be anything within an  
11 exit stairwell, anything particularly that's  
12 combustible or flammable.

13 Q. I see. Why is this dangerous?

14 A. If you had a fire in your fire protected  
15 exit stairwell, that would cause a lot of problems.

16 Q. I see. Had this one been remedied?

17 A. This had been remedied, yes.

18 Q. And did the Park City inspector agree with  
19 you on this one?

20 A. He did.

21 Q. Okay. Let's turn over to the west exit  
22 stairway and exit discharge, point number 1. Can you  
23 walk us through your analysis there?

24 A. Yes. Now moving to the west exit  
25 stairway --

1 Q. And let me ask one question. Which exit  
2 stairway is closest to the leased space?

3 A. The west stairway.

4 Q. Okay. So would this one be the primary --  
5 you would expect this to be the primary exit from the  
6 leased space?

7 A. Yes, I would expect that.

8 Q. Okay. Very well. Proceed with number 1.

9 A. So this -- through this door you're seeing  
10 would exit people from the third floor and the second  
11 floor and possibly from the main level and from the  
12 parking garages entering the stairwell and coming to  
13 this exit discharge location. I noticed quickly  
14 that, one, the stairs were not wide enough, they did  
15 not meet the 44-inch minimum width requirement and  
16 they also had -- the landing was -- did not meet the  
17 44-inch width minimum.

18 In addition, there are no handrails or  
19 things that would assist people to climb those  
20 stairs.

21 Q. Okay. What type of danger does a  
22 violation of this code create?

23 A. Well, the code would identify a minimum  
24 width that provides enough -- enough area for --  
25 let's say panicking people to get out without



1 tripping and climbing over each other. 44 inches is  
2 identified as the minimum width. It could be larger  
3 than that depending on occupancy, but 44 is the  
4 minimum. These stairs are 36, which is a residential  
5 standard.

6 In addition, we've talked about areas of  
7 refuge. This stairwell will connect to those areas  
8 of refuge and provide access for rescue personnel to  
9 remove and assist people, say, carry them out in a  
10 fireman's carry or a wheelchair, and you need enough  
11 room to do that. So 44 inches is the minimum.

12 Q. I see. Did the Park City inspector agree  
13 with you in points 1 and -- can you explain to me, is  
14 point 2 similar to point 1?

15 A. Yes. I'm sorry. I just did them both.

16 Q. Okay. And the Park City inspector agreed  
17 with you on both points 1 and points 2?

18 A. Yes, he did.

19 Q. Can you explain point number 3?

20 A. Number 3 at the top of the stairs, we just  
21 discussed there is an alley that -- on the west side  
22 of the building. There's also -- you can see some  
23 metal stairs coming down from the main level. They  
24 enter this alleyway here, which is an exit court.  
25 And then there needs to be a clear path to the public

1 way. This is blocked, you can see, by the stairs,  
2 blocked part of the sidewalk. And also there's a  
3 power box that's been installed that there -- that  
4 instantly reduces the width here and causes a jam,  
5 which is prohibited by the building code.

6 Q. What is the measurement on the actual  
7 cement there between the stairs and the snow?

8 A. 22 inches.

9 Q. What's the measurement between the stairs  
10 and the power box?

11 A. 41 inches.

12 Q. Can you turn back one page and look with  
13 me at the picture on point 2? Is that picture  
14 pointing back up the alleyway the opposite direction?

15 A. Yes.

16 Q. Is the Gateway Center the only place  
17 that's exiting down through this alleyway?

18 A. No, it's not.

19 Q. Okay. What additional dangers does that  
20 create?

21 A. Well, there are four, maybe five other  
22 buildings that exit out into this alleyway on the  
23 west side of the Gateway Center. These are buildings  
24 along Park City's Main Street. They're older  
25 buildings. You can kind of tell by the stairs.

1 They're -- so there's a lot more exiting into this  
2 alleyway.

3 Q. And what type of danger does this  
4 condition create?

5 A. Well, certainly if there was a problem, a  
6 fire or an earthquake or explosion or something, you  
7 would have a lot of people fleeing into this area and  
8 trying to get out.

9 Q. Okay. What types of danger does that  
10 create?

11 A. Well, the danger would be slower people  
12 get trampled, the kind of thing you hear about in the  
13 news sometimes.

14 Q. Okay. Very good. On points 1, 2 and 3,  
15 did the Park City inspector agree with you?

16 A. Yes.

17 Q. Have any of these been remedied?

18 A. Not as of yesterday.

19 Q. Okay. Let's go to point number 4.

20 A. Number 4. I noted that since this was an  
21 exit court that was less than ten feet wide, that the  
22 building code would require the walls of the  
23 buildings on both sides to be one-hour fire resistive  
24 in order to provide additional safety for that area.  
25 And I noted that the Gateway Center does have

1 one-hour fire resistive walls, but the adjoining  
2 buildings do not.

3 Q. I see. Did the Park City inspector agree  
4 with you on this?

5 A. No. He -- he said that this -- he would  
6 not call this an exit court.

7 Q. Okay.

8 A. I don't know what he would call it.

9 Q. Okay. But he disagreed with you on that  
10 one?

11 A. Yeah.

12 Q. Okay. Number -- central elevators and  
13 exit corridor, point number 1.

14 A. I was asked also to look at accessibility  
15 issues. And I did note that from the public parking  
16 garage it was not able to access the elevators from  
17 either side of the garage. There's a -- you can see  
18 that there's a striping and cars in the way on the  
19 top picture. If there's a car parked there, you  
20 wouldn't be able to get in in a wheelchair. And on  
21 the bottom picture there's a railing that narrows the  
22 width to 28 and a half inches.

23 Q. Did the Park City inspector agree with you  
24 on this point?

25 A. Yes, he did.

1 Q. Mr. Johnston, I'm now going to move away  
2 from the report.

3 Have you seen a letter that was written by  
4 Mr. Cooper Roberts Simonsen (sic) indicating that  
5 some of your analysis may not be correct?

6 A. I saw that letter.

7 Q. To the allegation that the current code  
8 IBC 2006 does not require an area of refuge for a  
9 building that has a fire suppression system and is  
10 less than five stories in height, how do you respond?

11 A. I respond he's incorrect. There is no  
12 exception in the 2006 IBC that would alleviate the  
13 need for areas of refuge.

14 Q. To the allegation that the west basement  
15 stairway meets the 1984 UBC, how do you respond?

16 A. I responded that the 19 -- there is no  
17 1984 UBC. There's a 1994. And if that's what he's  
18 referring to, the 1994 UBC absolutely does require  
19 that the stairwells be 44 inches or wider.

20 Q. And did the city inspector agree with you  
21 on your analysis?

22 A. Yes, he did.

23 Q. And on point number 1, did he agree with  
24 you on your analysis that --

25 A. Yes, he did.

1 Q. And then in the final, the west exit  
2 stairway which evacuates people from the upper levels  
3 of the Gateway Center empties into a public  
4 right-of-way along the west side of the building,  
5 because of the public right-of-way and it is not an  
6 exit court, the comments do not apply. How do you  
7 respond to that?

8 A. Well, if he's saying it's not a -- if it's  
9 not an exit court and he's calling it a public  
10 right-of-way -- which it is dedicated for public  
11 access, that's true -- then it would need to be ten  
12 feet -- minimum ten feet wide, unobstructed for the  
13 full length, open to the air, unobstructed for ten  
14 feet to the street, which it is not.

15 Q. Okay. So under his analysis, if it is, in  
16 fact, a public right-of-way, is it compliant with  
17 what would be required?

18 A. Then it's not compliant with the  
19 requirements.

20 Q. Okay.

21 A. And if it's -- since -- okay.

22 MR. GORDON: I'm sorry, Your Honor. No  
23 further questions.

24 THE COURT: Mr. Payne, any desire to  
25 cross-examine?

1 MR. PAYNE: Yes, Your Honor.

2 THE COURT: Maybe before you begin, Mr.  
3 Payne.

4 I apologized for the scheduling conflict.  
5 It's not this hearing's fault. Judge Boulden recused  
6 herself in a fairly significant case with a number of  
7 pending matters, and so the Court set a status  
8 conference on that case. There's also one other  
9 matter, I'm not sure when it got put on the calendar,  
10 but I would like to take that matter now. It's  
11 simply a pretrial scheduling conference.

12 MR. GORDON: I have no objection to that,  
13 Your Honor.

14 MR. PAYNE: I have no objection. We're  
15 fine with that, Your Honor.

16 THE COURT: Will you call that matter?  
17 (Recess.)

18 THE COURT: Let me just indicate to  
19 counsel and the parties present that you'll have  
20 adequate time to present your evidence in your case  
21 today. I propose that we proceed for a while.  
22 Depending upon how the cross-examination of  
23 Mr. Johnston goes, perhaps it would be appropriate to  
24 take a break in this case and come back in 30 minutes  
25 or so, proceed at your leisure, or we can forge

1 ahead.

2 So why don't we go ahead and finish up  
3 with Mr. Johnston and see where we're at.

4  
5 CROSS-EXAMINATION

6 BY MR. PAYNE:

7 Q. Mr. Johnston, I believe you stated that  
8 you had been licensed as an engineer in the State of  
9 Utah for some period of time; is that correct?

10 A. Yes.

11 Q. How long have you been a structural  
12 engineer, a licensed structural engineer with the  
13 State of Utah?

14 A. The State of Utah, last year -- previous  
15 to 2009 had -- didn't clarify too much in the  
16 engineering community between the difference of a  
17 professional engineer and a structural engineer. So  
18 I was operating as a structural engineer under the  
19 professional engineering license, or a PE as it's  
20 commonly known.

21 Q. Okay.

22 A. Last year they converted all of us to an  
23 SE, or a structural engineering, separate licensure.

24 Q. Did a professional engineering license  
25 include land surveying and that sort of thing as



1 well?

2 A. No. A professional engineer is not a  
3 professional land surveyor.

4 Q. Okay. In connection with the Gateway  
5 Center premises you were asked to inspect, did you  
6 review the lease under which Easy Street Partners was  
7 occupying the space?

8 A. I did not review a lease.

9 Q. Were you aware that the parking garage was  
10 not specifically -- was specifically excluded from  
11 the property that they had -- that they had a right  
12 to under the lease?

13 A. I was aware that park -- let's see. Park  
14 City -- the first tier is public parking for the  
15 building and the bottom tier is leased -- you can  
16 rent a space in that parking area.

17 Q. Are you familiar with any building codes  
18 that predate 1994?

19 A. Yes.

20 Q. You mentioned that you believe the 1994  
21 building code applied to this property. Why is that?

22 A. From Park City building department.

23 Q. Okay. Are you aware that the parking  
24 garage was in place prior to 1994?

25 A. Yes. I'm aware of that.

1 Q. Do you know what building code that would  
2 have been built under?

3 A. No, I don't.

4 Q. Do you have any experience in dealing with  
5 application of building codes to preexisting  
6 buildings?

7 A. Yes.

8 Q. What experience do you have in that area?

9 A. I do structural investigations of historic  
10 buildings, of buildings that are being converted --  
11 the use will be changing, such as from commercial to  
12 residential or residential to commercial.

13 Q. In connection with your review of the area  
14 of refuge issue, you stated that there was no update  
15 to the building code. Did you check the current  
16 version of the administrative regulations in Utah  
17 Administrative Code R156-56?

18 A. Yes, actually, I did, for the 2006  
19 building code, which is the current code right now.

20 Q. You didn't find anything in that code that  
21 would indicate that there's an exception for fully  
22 sprinkled buildings?

23 A. Correct. There's no exception for an area  
24 of refuge in fully sprinkled building in the 2006  
25 code. I did check that.

1 Q. Is there in any code?

2 A. Right now I can't -- I wouldn't know.

3 Q. In the current code -- is the 2006 code  
4 the current code then? Is that what you're --

5 A. It is right now. In July it will be the  
6 2009.

7 Q. Do you believe that the Gateway Center  
8 space that was leased by Easy Street Partners is  
9 dangerous to occupy?

10 It's unsafe to occupy? Yes or no, please.

11 A. Yes.

12 Q. Isn't it true that Park City building  
13 inspection department disagrees with you?

14 A. I don't have -- I don't have his letter to  
15 tell you the exact wording.

16 Q. I would like to refer you to Exhibit 5,  
17 please.

18 A. Do I have -- I don't have 5.

19 Thanks.

20 Q. You've seen this letter before, haven't  
21 you?

22 A. Yes, I have.

23 Q. Okay. It goes through a number of issues  
24 that were presented to the city by or on behalf of  
25 Easy Street Partners; is that correct?

1 A. Yes.

2 Q. I call your attention to page 2 of the  
3 letter.

4 A. Uh-huh (affirmative).

5 Q. The concluding paragraph. Can you read  
6 that first sentence, page 2, that paragraph?

7 A. Yeah. Mr. Simister wrote, in conclusion I  
8 believe the space occupied by Mr. Shoaf is safe to  
9 occupy.

10 Q. Okay. Thank you.

11 So, in fact, Park City does disagree with  
12 your assessment of that; isn't that right?

13 A. Kurt Simister does.

14 Q. And you're familiar that he is a senior  
15 inspector in the building department of Park City,  
16 are you not?

17 A. Uh-huh (affirmative). Yes.

18 Q. Okay.

19 MR. PAYNE: May I just have one moment?

20 I think those are all the questions I have  
21 for this witness, Your Honor.

22 THE COURT: Any desire for redirect?

23 MR. GORDON: No, Your Honor, I don't think  
24 so.

25 THE COURT: All right. Mr. Johnston, you

1 may step down.

2 THE WITNESS: Do you want these back?

3 THE COURT: You can just leave them there.

4 THE WITNESS: Okay.

5 MR. GORDON: I don't know if your desire  
6 is to proceed at this point or go to the other  
7 matter.

8 THE COURT: Well, so the scheduling  
9 conference that I've set I think should probably take  
10 about 30 minutes, no more. I'm not addressing any  
11 substantive matters. It would appear that on this  
12 matter we're probably going to need more than 20  
13 minutes.

14 MR. GORDON: Yes, Your Honor.

15 THE COURT: And so if you don't have any  
16 objection, I would like to take a recess. I need to  
17 get an individual on the telephone. We'll take that  
18 matter -- the scheduling conference and then come  
19 back to this matter.

20 MR. GORDON: Thank you, Your Honor. No  
21 objection to that.

22 THE COURT: All right. The court is in  
23 recess.

24 THE CLERK: All arise.

25 (Recess.)

1 THE CLERK: All arise.

2 Court resumes its session.

3 Please be seated.

4 THE COURT: All right. Well, thank you,  
5 counsel. I apologize for that interruption, but  
6 hopefully we'll get through your hearing today.

7 You may proceed.

8 MR. GORDON: Thank you, Your Honor. Do we  
9 have other time constraints or do we have -- what are  
10 we up against for the rest of the afternoon, Your  
11 Honor?

12 THE COURT: 5:00.

13 MR. GORDON: Okay. And we'll be done  
14 certainly before then. So --

15 THE COURT: Okay.

16 MR. GORDON: Thank you. If I may, Your  
17 Honor, if I can call my next witness, which is Bill  
18 Shoaf.

19 THE CLERK: Please step forward and raise  
20 your right hand.

21

22 WILLIAM SHOAF,

23 called as a witness, having been duly  
24 sworn, was examined and testified as follows:

25 \*\*\*

1 THE CLERK: Please take the witness stand.  
2 State and spell your name.

3 THE WITNESS: My name is William Shoaf,  
4 W-I-L-L-I-A-M, S-H-O-A-F.

5

6 DIRECT EXAMINATION

7 BY MR. GORDON:

8 Q. Is it okay if I call you Bill?

9 A. Sure.

10 Q. What is your association with Easy Street  
11 Partners?

12 A. I am the managing partner.

13 Q. What is your association with Cloud Nine  
14 Resorts?

15 A. I'm the managing director.

16 Q. What interest does Cloud Nine hold in Easy  
17 Street Partners?

18 A. It is one of the partners of Easy Street  
19 Partners.

20 MR. GORDON: May I approach, Your Honor?

21 THE COURT: You may.

22 Q. (By Mr. Gordon) Bill, I'm handing you  
23 what has been marked as -- and I actually did not  
24 look. Is it Exhibit Number 10?

25 A. Number 8.

1 Q. Number 8. Do you recognize it?

2 A. Yes, I do.

3 Q. What is it?

4 A. It is the lease for the Gateway offices.

5 Q. Is this a true and correct copy of the  
6 lease that Cloud Nine Resorts entered into with  
7 Gateway Center in August 3rd, 2007?

8 A. Yes, it is.

9 MR. GORDON: Your Honor, I would move to  
10 enter this exhibit into evidence.

11 MR. PAYNE: No objection.

12 MR. GORDON: Your Honor, may I approach?

13 THE COURT: You may.

14 Exhibit 8 is received.

15 Q. (By Mr. Gordon) Bill, what is the lease  
16 term?

17 A. The lease term is up in December of this  
18 year. And it was a three-year lease that commenced  
19 in January of 2008.

20 Q. Where is the leased space?

21 A. It's on the third floor of the Gateway  
22 Center on Heber Avenue.

23 Q. What is the monthly rent? And please  
24 distinguish for me between rent and CAMs.

25 MR. PAYNE: Objection for relevance. I'm



1 not -- they didn't object to the amount of the lease,  
2 of the calculations. They just objected to it based  
3 on -- they said it wasn't enforceable. There's no  
4 objection to any of the particular claimed amount  
5 other than under -- an asserted breach of covenant of  
6 inhabitability or basically constructed eviction.  
7 There's nothing about the calculation that I saw in  
8 the objection to the proof of claim, Your Honor.

9 MR. GORDON: In the correspondence back  
10 and forth -- and that is probably correct, Your  
11 Honor. We have raised the issue of breach of  
12 warranty and inhabitability and breach of quiet  
13 covenant. We have put them on notice in prior  
14 correspondence of issues with CAMs. And I will rely  
15 on Ken with the possibility of bringing a separate  
16 action in this case. And that may or may not be  
17 relevant with what we're dealing with today.

18 Ken, is that --

19 MR. CANNON: Honor, what's before the  
20 Court today is just the objection to claim. There  
21 are other issues with respect -- depending on how  
22 this goes. And obviously there are other issues with  
23 respect to rent and common area charges paid in the  
24 past, which are not before the Court today. And so  
25 the relevancy -- you know, I don't know -- if they're

1 not relevant to the objection, I don't think they're  
2 relevant to the hearing today.

3 THE COURT: Mr. Payne, are common area  
4 charges, CAM charges, part of the proof of claim?

5 MR. PAYNE: Yes, they are, Your Honor.  
6 But, again, there was no objection to the amount.  
7 There was no allegation that it was misstated. They  
8 simply -- the only bases that I can see in the  
9 objection were an alleged breach of covenant of  
10 implied habitability and a breach of covenant of  
11 quiet enjoyment that was asserted relieve them of any  
12 responsibility to pay. So we're not on notice that  
13 any issue with calculations or particular charges  
14 would be before the Court because that wasn't  
15 asserted as a basis for -- one of the bases for the  
16 objection.

17 THE COURT: Is there any objection, Mr.  
18 Payne, if the Court reserves any challenge to the CAM  
19 charges for a later date?

20 MR. PAYNE: Could I have just a moment to  
21 speak with the property manager, Your Honor?

22 THE COURT: All right.

23 MR. GORDON: While he's doing that, Your  
24 Honor, may I approach and get an exhibit marked?

25 THE COURT: You may.

1 MR. PAYNE: Your Honor, the property  
2 manager, not being aware that that might be an issue  
3 with the Court today -- I guess our preference would  
4 be to let the Court reserve that rather than try to  
5 address it today where we are not fully prepared on  
6 that since we didn't believe we had notice of it.

7 THE COURT: In reviewing the response  
8 there -- some of the response does go to CAM charges,  
9 but I think -- I mean at least references CAM  
10 charges.

11 MR. PAYNE: That's true.

12 THE COURT: I think that -- why don't we  
13 limit -- I mean, I don't know that the evidence is  
14 not admissible, I just don't know that it's really  
15 relevant. Isn't the only dispute really the CAM  
16 charges, it's not really the amount under the lease  
17 or the calculation other than the CAM charges?

18 MR. GORDON: Right. There would be a  
19 claim potentially for, you know, a chargeback or  
20 something like that. I don't think there's a dispute  
21 as far as what CAM have been paid.

22 THE COURT: All right. Well, based on  
23 that and if the Court reserves the issue of CAM  
24 charges, I guess what's the relevancy of the question  
25 then?

1 MR. GORDON: Just establishing the  
2 distinction between the cost of rent and the amount  
3 of CAMs that was paid, Your Honor. And what I could  
4 do -- let me just rephrase the question.

5 Q. (By Mr. Gordon) Bill, what is the monthly  
6 rent under the lease?

7 A. In total?

8 Q. Uh-huh (affirmative).

9 A. Approximately \$9600.

10 Q. And does that include rent and CAMs?

11 A. Yes, it does.

12 Q. Can you read paragraph -- just the first  
13 line of paragraph number 22 in the lease?

14 A. Covenant of quiet enjoyment. For as long  
15 as a tenant is faithfully performing its obligations  
16 under this lease, landlord promises to provide tenant  
17 with quiet enjoyment of the premises.

18 Q. Thank you.

19 MR. GORDON: May I approach, Your Honor?

20 THE COURT: You may.

21 Q. (By Mr. Gordon) Bill, I'm handing you  
22 what's been marked as Exhibit Number 9. Do you  
23 recognize it?

24 A. Yes, I do.

25 Q. What is it?

1           A.       It's an assignment between Cloud Nine  
2       Resorts and Easy Street Partners with regards to the  
3       lease at Gateway.

4           Q.       When was this signed?

5           A.       On the 9th day of January, 2009.

6           MR. GORDON: Your Honor, I would move to  
7       have this admitted into evidence.

8           MR. PAYNE: No objection.

9           THE COURT: Exhibit Number 9 is received.

10          MR. GORDON: Your Honor, may I approach?

11          THE COURT: You may.

12          Q.       (By Mr. Gordon) Bill, when did -- when  
13       did -- when was the space first occupied under the  
14       lease?

15          A.       In December of -- well, in January of  
16       2009 -- eight, sorry. 2008.

17          Q.       How many employees were occupying the  
18       space?

19          A.       Approximately upwards -- at the most,  
20       about 18.

21          Q.       Did the space have room for clients and  
22       visitors?

23          A.       Yes, it did.

24          Q.       How were you using the space?

25          MR. PAYNE: Objection, ambiguous. "You,"

1 who is that referring to? Is it referring to --

2 MR. GORDON: I'm sorry.

3 Q. (By Mr. Gordon) How was the tenant --

4 THE COURT: Just -- objection sustained.

5 MR. GORDON: Oh, sorry, Your Honor.

6 Q. (By Mr. Gordon) How was the tenant using  
7 the space?

8 MR. PAYNE: Objection, I think it's  
9 ambiguous. Which tenant? We've got two tenants with  
10 an assignment and assumption here.

11 THE COURT: Sustained.

12 Q. (By Mr. Gordon) How was the tenant --  
13 were you involved with both Cloud Nine and Easy  
14 Street Partners?

15 A. Yes, I was.

16 Q. Are you aware of how both of those  
17 entities was using space?

18 A. Yes.

19 Q. How was Easy Street Partners and Cloud  
20 Nine Resorts using the space?

21 A. Which one would you like me to address  
22 first?

23 THE COURT: I think that's called a  
24 compound question.

25 MR. PAYNE: Objection, compound. I'll

1 object on that basis, Your Honor.

2 Q. (By Mr. Gordon) Okay. How was Easy  
3 Street Partners using the space?

4 A. Easy Street Partners housed the human  
5 resource, the accounting, the spa director, the  
6 sales -- the hotel sales force and storage of  
7 material, collateral material and other things in  
8 that space.

9 Q. When Easy Street Partners was using the  
10 space, what was the maximum number of people at any  
11 given time that would be in this space?

12 A. You could probably get up to as many as  
13 30, 35 when we were doing orientation classes for our  
14 employees.

15 MR. GORDON: May I approach, Your Honor?

16 THE COURT: You may.

17 Q. (By Mr. Gordon) Bill, I've handed you  
18 what has been marked as Exhibit Number 10. Do you  
19 recognize it?

20 A. Yes, I do.

21 Q. What is it?

22 A. It's a schematic floor plan of our office  
23 space along with other office spaces on that half of  
24 the floor.

25 Q. Is this an accurate depiction of the space

1 at the time that Cloud Nine Resorts entered into the  
2 lease?

3 A. No.

4 Q. What is different about it?

5 A. This drawing was done by the architect or  
6 the landlord after he visited the site. The actual  
7 land -- the actual floor plan that was attached to  
8 the lease was incorrect.

9 Q. And let me clarify. Is this the one that  
10 was -- if you'll look at it closely. Is this the one  
11 that was attached to the lease or is this one that  
12 was subsequently created?

13 A. This is the subsequently created floor  
14 plan which reflected the actual space.

15 Q. I see. So let me clarify then. Does this  
16 schematic represent the actual -- the property at the  
17 time that Cloud Nine entered the lease?

18 A. That is correct.

19 Q. Okay.

20 MR. GORDON: May I approach, Your Honor?

21 THE COURT: You may.

22 Q. (By Mr. Gordon) I'm handing you two  
23 markers, Bill. Would you, please, mark for me in red  
24 the space that was built out in offices?

25 For purposes of clarity, can you mark that



1 or assign area 1 to that?

2 A. Uh-huh (affirmative).

3 Q. With the green marker, can you, please,  
4 outline what constitutes the -- all other space --  
5 all other leased space?

6 And for purposes of clarity, can you mark  
7 that area area number 2?

8 A. Okay.

9 MR. GORDON: Your Honor, I would move to  
10 have Exhibit Number 10 admitted into evidence.

11 MR. PAYNE: Your Honor, I'll object. I  
12 haven't had an opportunity to see any markings on the  
13 document.

14 MR. GORDON: Can I show it to opposing  
15 counsel, Your Honor?

16 THE COURT: You may.

17 Attached to Easy Street Partners' reply  
18 memorandum was an Exhibit C, which was a schematic  
19 drawing. Is that the same schematic drawing?

20 MR. GORDON: It is, Your Honor. I've just  
21 re-created that for the Court.

22 THE COURT: Except the colors are re --

23 MR. PAYNE: Okay. That saves me some  
24 time.

25 THE COURT: Except I think the colors are

1 re-created just the opposite.

2 MR. GORDON: The red and green was  
3 switched.

4 Okay. So any objection on the admission  
5 of Exhibit Number 10?

6 MR. PAYNE: No objection.

7 THE COURT: Exhibit Number 10 is received.

8 MR. GORDON: Your Honor, would you like me  
9 to hand that to you or --

10 THE COURT: Well, I think you'll need to  
11 leave it with the witness.

12 Q. (By Mr. Gordon) Let's focus on area 2  
13 first, Bill, which is the long, open room. During  
14 the course of the lease, did you become concerned  
15 with this space?

16 A. Yes, I did.

17 Q. Why?

18 A. We had an inspection of our office and an  
19 inspection of our hotel across the street by the Utah  
20 occupational safety hazard -- safety and health  
21 administration. During that inspection the officer  
22 in charge of that learned that we had offices in the  
23 Gateway and, as a result, he included the leased  
24 space as part of his overall inspection of the  
25 property.

1 MR. GORDON: Your Honor, may I approach?

2 THE COURT: You may.

3 Q. (By Mr. Gordon) Bill, I've handed you  
4 what has been marked as Exhibit 11. Do you recognize  
5 it?

6 A. Yes.

7 Q. What is it?

8 A. It's the report from the occupational  
9 safety and -- board.

10 Q. Is this a true and correct copy of the  
11 report that you received from UOSH?

12 A. Yes, it is.

13 MR. PAYNE: Object. I'm sorry. Object on  
14 "you" and ambiguity as to who "you" is. Is it  
15 Mr. Shoaf personally or one of the entities who was  
16 the lessee?

17 THE WITNESS: It was actually delivered to  
18 Ms. Marina Soto, who is our human resource director.

19 Q. (By Mr. Gordon) Okay. Was this  
20 delivered -- okay. Was this delivered to Cloud Nine  
21 Resorts?

22 A. No. It was delivered to the Sky Lodge.

23 MR. GORDON: Your Honor, I would move to  
24 admit this into evidence.

25 MR. PAYNE: Objection, foundation, hearsay

1 and relevance. I don't believe there's any reference  
2 to the property address of the leased property here  
3 or any mention of Gateway Center in this entire  
4 document that I've been able to find, Your Honor.

5 MR. GORDON: I can lay that foundation,  
6 Your Honor.

7 Q. (By Mr. Gordon) If you'll --

8 THE COURT: What about the hearsay?

9 MR. GORDON: I'm sorry. What specifically  
10 is objected to on the hearsay?

11 THE COURT: That the document is hearsay.

12 MR. GORDON: It would be admitted under  
13 rule 8038, I believe. Rule 8038, public records and  
14 reports. And this states, Your Honor, that the  
15 following are not excluded by the hearsay rule even  
16 though the declarant is available as a witness.  
17 Records, reports, statements or data compilations of  
18 any form of public offices or agency setting forth  
19 the activities of the officer, agency -- which this  
20 clearly is -- or matters observed pursuant to duty  
21 imposed by law as to which matters there was a duty  
22 to report.

23 So I would move to have it admitted under  
24 that exception to the hearsay rule.

25 THE COURT: Mr. Payne?

1 MR. PAYNE: I think there's still an  
2 issue, Your Honor, with respect to foundation as far  
3 as its preparation and tying it to the state agency  
4 that has purported to prepare this. And I think  
5 there's also a question as to relevance because I  
6 don't believe it refers -- there's no indication here  
7 that it refers to the property in question, that  
8 identifies that property or Gateway Center or the  
9 street address.

10 THE COURT: All right. I'll sustain the  
11 objection.

12 MR. GORDON: Okay.

13 Let me lay some additional foundation,  
14 Your Honor, and see if we can get it in with this  
15 witness. If not, we'll use another one.

16 THE COURT: You may.

17 Q. (By Mr. Gordon) Bill, would you turn to  
18 page 9?

19 A. Yes.

20 Q. Is there any reference on page 9 to part  
21 of the inspection that the UOSH individual did on the  
22 Gateway?

23 A. Yes.

24 Q. Where is it?

25 MR. PAYNE: Objection. I move to strike

1 on foundation, how he knows that this refers to an  
2 inspection on the Gateway Center, that particular  
3 part of this report. And also based on the parol  
4 evidence rule, Your Honor. I'm not sure why -- if  
5 it's not in the document, why are we going outside  
6 the document to say what the document refers to?

7 MR. GORDON: Well, the document is  
8 obscure, Your Honor, but actually refers to -- and do  
9 you know what? I can probably have Marina Soto  
10 testify to this, who actually did the walk-through  
11 with the OSHA individual. And we may have an easier  
12 time getting it in through her.

13 THE COURT: All right. I'm going to  
14 sustain the objection.

15 MR. GORDON: Very good.

16 Q. (By Mr. Gordon) We will move off of this,  
17 Bill, and I'll reintroduce this through Marina.

18 A. Sure.

19 Q. Did you meet with the UOSH inspector on  
20 the day that he conducted the inspection?

21 A. Yes, I did.

22 Q. What happened?

23 A. The inspector basically informed me of  
24 a -- of his findings.

25 MR. PAYNE: Objection, hearsay, Your

1 Honor.

2 THE COURT: I guess the real issue is  
3 what's the purpose of the question? That he spoke  
4 with the --

5 MR. GORDON: The relevance, Your Honor, is  
6 that there have been claims made that my client has  
7 been trying to dig up problems with this space. And  
8 we're trying to establish that UOSH actually was the  
9 party that created the doubt in the first place and  
10 that all things led from there. And so what occurred  
11 with the UOSH report and the representations made  
12 concerning the safety of the space really was the  
13 spark that started what we're here talking about  
14 today.

15 THE COURT: Well, and I think -- isn't  
16 that classic hearsay? I mean, isn't the person that  
17 would say we're the ones who started this someone  
18 from UOSH?

19 So I'm going to sustain the objection.

20 I mean, the fact that Mr. Shoaf had  
21 discussions with the representative of UOSH is not  
22 hearsay. But I think your question was going to the  
23 substance of the conversations he had regarding these  
24 violations.

25 MR. GORDON: Okay.

1 Q. (By Mr. Gordon) Mr. Shoaf, after your  
2 discussions with the UOSH inspector, what was your  
3 impression of the safety of your space?

4 A. That there were potential violations and  
5 fire and safety issues that we needed to address.

6 Q. When you found out -- when you became  
7 concerned about this, what did you do?

8 A. The first thing I did was have my  
9 facilities manager get involved with this report and  
10 begin to address all of the issues that had been  
11 raised.

12 Q. After you looked at the issues that had  
13 been raised, did you have a concern that the space  
14 was safe?

15 A. Yes.

16 Q. Did you notify the city?

17 A. Yes.

18 Q. When?

19 A. Within a week of this report, of our  
20 meeting with this gentleman.

21 Q. Okay. What happened?

22 A. We had measured from -- what we understood  
23 was the proper way, from the back of space number 2  
24 to the doors, the exit doors of the facility to the  
25 fire (sic), and had ascertained that they were well



1 in excess of 100 feet.

2 Q. During the meeting with the city, did you  
3 ask the city inspector for anything?

4 A. Yes, I did.

5 Q. What did you ask him for?

6 A. I asked him if he could provide us with  
7 some kind of document that would clearly state that  
8 the concerns raised to us were not founded and that  
9 the city was -- felt we were in a compliant space  
10 that was safe and that we could use that document to  
11 indemnify us against any future liabilities.

12 Q. Did the city ever issue you the requested  
13 letter?

14 A. No.

15 Q. What happened after you met with the city?

16 A. Well, after we met with the city, we then  
17 notified the landlord and his agent of our concerns.

18 Q. Okay. Did you propose solutions at the  
19 time?

20 A. Yes, we did.

21 Q. What were they?

22 A. There were several. One that we reviewed  
23 with the landlord's architect, which was a  
24 modification of the interior space to in effect allow  
25 us to get under the 100-foot issue that seemed to be

1 the problem. We also suggested that we could move to  
2 an additional -- a different space in the building if  
3 that would help solve the problem.

4 Q. Was there ever an agreement on either of  
5 those suggestions?

6 A. No.

7 Q. Did the landlord send anyone to meet with  
8 you to address the issues?

9 A. Yes. He sent his architect Aarin, Aarin  
10 Holt.

11 Q. And what happened in that meeting?

12 A. In the first meeting was when -- when  
13 Aarin came is when it became -- he also had the  
14 incorrect floor plan, the one that's attached to the  
15 original lease. So the first thing that had to  
16 happen was he did a new drawing and an as-built. But  
17 during that first meeting we discussed the potentials  
18 of sort of bifurcating the office and moving the  
19 egresses and how that might solve the problems here.

20 Q. After your meeting with him, what  
21 happened?

22 A. Well, after that meeting he came back with  
23 the new drawing and brought a mechanical measuring  
24 device and we walked off the lineage twice. One  
25 method he used we came to 98.9 inches -- 98.8 feet.

1 Q. What method was that?

2 A. Basically he -- he just sort of walked as  
3 closely to the walls and around the corners as he  
4 could.

5 In the other measurement, it was done  
6 using right angles, which was our understanding of  
7 what the code requires.

8 Q. And what was the result of the right angle  
9 measurement?

10 A. It was 103 plus feet.

11 Q. Okay. Did you ask Aarin Holt for anything  
12 during that meeting?

13 A. I asked him what I could do to get some  
14 document that would certify that we were in  
15 compliance and that the space was fit for use and we  
16 wouldn't be liable. And he said that could only be  
17 issued by Park City.

18 Q. Did the landlord offer any other  
19 individual to offer an opinion on the egress issue?

20 A. The -- Aarin Holt reached out to a  
21 gentleman who works as a senior architect for the IBC  
22 and then those conversations were via e-mail and  
23 phone calls in which he was asking this gentleman  
24 about the code and the 100 feet and how you measured  
25 it and what was the proper interpretation of the

1 code.

2 Q. After your -- did you communicate directly  
3 with Mr. Hahn?

4 A. I did.

5 Q. After your communication with Mr. Hahn,  
6 what was your impression concerning the compliance of  
7 your leased space?

8 MR. PAYNE: Objection as far as foundation  
9 for an impression. I think what he's trying to do is  
10 do an end run around the hearsay rule, Your Honor.

11 THE COURT: Well --

12 MR. GORDON: It's based on --

13 THE COURT: I'm going to let him testify  
14 as to what his impression was and give it the weight  
15 that is appropriate.

16 Q. (By Mr. Gordon) So what was your  
17 impression after your -- after communicating with  
18 Mr. Hahn concerning the space and whether it was  
19 compliant or not with safety code?

20 A. Mr. Hahn wrote me an e-mail that said it  
21 was not compliant based upon the measurements that he  
22 asked me to do.

23 Q. After meetings with the city, meetings  
24 with their architect and communicating with Mr. Hahn,  
25 did you ever receive any verification from the city